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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER EARL ANDERSON, Defendant and Appellant.	C044043 (Super. Ct. No. CM017836)

A jury convicted defendant Christopher Anderson of first degree murder (Pen. Code, § 187, subd. (a)) and found that he personally and intentionally used a firearm in the commission of the offense (Pen. Code, § 12022.53, subd. (d)). He was committed to state prison for an aggregate term of 50 years to life.[1]

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[1] We shall order the trial court to amend the abstract of judgment, which incorrectly reflects that the court imposed a term of 25 years to life for the violation of Penal Code section 12022.53, subdivision (b), instead of subdivision (d).

On appeal, defendant contends that the trial court committed prejudicial error in admitting autopsy photographs of the victim, and that ineffective assistance of counsel denied him a fair trial. We shall affirm the judgment.

FACTS

On September 4, 2002, defendant led George Pennington down a steep, secluded road to a driveway where a trailer purportedly was parked. Defendant had said that he would give the trailer to Pennington. Defendant was accompanied by Travis Rogers in defendant's truck. Pennington was in a car driven by Joseph Gomez and had armed himself with Gomez's knife in case trouble arose. Pennington asked Gomez to drive him that day because Pennington did not want to violate his parole by driving without a license. Gomez backed the car into the driveway, and defendant parked his truck in front of the driveway, facing back up the hill.

According to Gomez, defendant immediately got out of his truck and ran to the car. Pointing a gun at Pennington and Gomez, defendant shouted in a loud, angry voice for them to keep their hands where he could see them. He told Pennington to get out of the car and, when he saw the knife scabbard protruding from underneath Pennington's shirt, he ordered him to "take that pig sticker off and drop it on the ground." While Pennington was complying with his demand, defendant advised Gomez to move his head out of the way so defendant would not have to shoot through it to get to Pennington. After Pennington had dropped the knife on the ground by the car door, defendant directed him to lie face down on the hood of the car, and told Gomez to take a walk down the hill.

As he walked away, Gomez saw Pennington lying across the hood of the car with his arms spread. Gomez heard defendant angrily accusing Pennington of stealing a welder. After Pennington denied the accusation, Gomez heard a gunshot. He turned around and saw that Pennington was in the same position and that defendant was standing five or six feet away. Gomez continued walking and heard another gunshot. He turned around again, and Pennington was still in the same position. Defendant hit Pennington twice very hard on the top of the head with the gun butt and said, "I will take you a piece at a time." Gomez started walking again and within a short period of time, he heard a third shot.

Gomez turned around and saw defendant pointing the gun at Pennington's head. Pennington was not moving. Telling Gomez to come back up the hill, defendant said, "Now what am I going to do with you?" After asking Gomez his name and where he resided, defendant grinned, walked back to his truck, and drove away. Gomez picked up the knife from the ground by the passenger side door and threw it in the car. He took Pennington, who had been fatally shot in the head, to the hospital.

Gomez testified that Pennington never acted aggressively towards either defendant or Rogers at any point during the day. After Pennington was lying on the hood of the car, Gomez never saw him in any other position, and he never saw defendant put down the gun.

Rogers testified defendant asked him to accompany defendant that afternoon because defendant was going to confront Pennington about stealing some tools or a welder. On the way to the trailer,

Rogers noticed defendant place a gun in his lap. As soon as Rogers parked the truck, defendant jumped out with the gun in his hand. Defendant demanded that Pennington and Gomez get out of the car with their hands up. Rogers stayed in the truck and did not see the confrontation; but he heard defendant tell Gomez to take a walk, and heard defendant yell at Pennington, "I want my fucking shit back."

Rogers urged defendant to "mellow out" or "take it easy" and heard Pennington ask, "What's this all about, brother?" Defendant responded, "I want my fucking shit. Where is my shit at?" Rogers heard three gunshots. After the third shot, he looked in the car mirror and saw Pennington's "legs slumped over across each other, and blood across the top [of] the hood." Defendant returned to the truck, told Rogers, "I just fucked up," and said that he had thrown his life away.

The next day, defendant was arrested at his home. Based on a surveillance video taken at the Gold Country Casino, where defendant and Rogers met with Pennington and Gomez before going to the trailer, the officers knew what clothes defendant had been wearing, knew that he had a ponytail, and knew that his truck had a camper shell. The officers searched the residence but could not find the clothes defendant wore on the previous day or a firearm. However, they noticed that he had cut off his ponytail and had removed the camper shell from his truck.

Dr. Thomas Resk, a forensic pathologist who performed the autopsy on Pennington, testified that he died from blunt force injuries cracking his skull open and from a gunshot wound through

the top of his head. The blunt force injuries, which were severe enough to affect Pennington's motor skills, "unquestionably came first" before the gunshot wound, which had been inflicted from a distance in excess of three or four feet. Using some of the autopsy photographs for demonstrative purposes, Resk explained how he could determine from the fracture and hemorrhaging patterns on Pennington's skull that the blunt force injuries occurred first.

Defense

Testifying that he acted in self-defense, defendant asserted, contrary to Gomez's and Rogers' testimony, that he did not get out of his truck with his gun until Pennington got out of the car with a knife. Defendant admitted that he directed Pennington to disarm and move to the hood of the car. He claimed that Pennington, while leaning on the hood of the car, grabbed the knife from near the windshield, at which point defendant hit him over the head twice with the butt of his gun, stepped back, and shot him.

Defendant conceded that after leaving the scene, he threw the gun in a lake and cut his ponytail. He also conceded that much of Gomez's and Rogers' testimony was true, including (1) defendant suspected Pennington of stealing a welder from him and was angry about it; (2) he got out of the truck quickly and ran to Gomez's car; (3) he pointed the gun and told Gomez to move his head back so defendant would not have to shoot him to get to Pennington; (4) he directed Pennington to drop the knife and lie on the hood of the car; and (5) he fired two shots in the air out of anger, prior to fatally shooting Pennington.

DISCUSSION

I

Defendant contends the trial court erred in admitting, over defense objection, autopsy photographs depicting Pennington's skull fractures and bullet wound. He claims that the photographs were irrelevant or that the court should have excluded them pursuant to Evidence Code section 352 (hereafter section 352).

Photographs are admissible if they are relevant and their probative value outweighs the probability that their admission creates a substantial danger of undue prejudice. (*People v. Heard* (2003) 31 Cal.4th 946, 972; *People v. Scheid* (1997) 16 Cal.4th 1, 13.) The trial court's exercise of its broad discretion in determining the admissibility of photographic evidence will not be disturbed on appeal absent a manifest abuse; i.e., unless the probative value of the photographs is clearly outweighed by their prejudicial effect. (*People v. Heard, supra,* 31 Cal.4th at pp. 973, 975-976; *People v. Bolin* (1998) 18 Cal.4th 297, 319; *People v. Crittenden* (1994) 9 Cal.4th 83, 135.)

Here, the prosecution argued four of the autopsy photographs were relevant because they illustrated the number of blows that defendant had inflicted to Pennington's skull and they also would assist Dr. Resk in demonstrating that the blows, which probably incapacitated Pennington, occurred before defendant shot him. This undermined defendant's claim of self-defense.

Concluding the probative value of the photos outweighed any possible prejudicial effect, the trial court allowed the prosecutor to introduce three of the photographs, which showed the scalp

pulled back, exposing the top and back of Pennington's skull from different angles. The court excluded the fourth photograph under section 352 as too inflammatory.

A

According to defendant, the photographs were irrelevant to any issues in dispute at trial. We disagree.

Whether defendant murdered Pennington with premeditation and malice aforethought, or killed him in self-defense, was the primary issue at trial. Thus, the photographs were relevant to corroborate Gomez's testimony that defendant clubbed Pennington on the head and shot him out of anger. This is so because the photographs tended to show that a vicious attack had been intentionally committed on a prone victim, rather than blows being inflicted in self-defense against an attacker. (*People v. Heard, supra*, 31 Cal.4th at pp. 973-974 [photographs were relevant to support witness's testimony, to show savageness of attack, and to show the defendant acted with malice]; *People v. Wash* (1993) 6 Cal.4th 215, 245-246 [photographs and slides relevant to prosecution's theory of deliberation and premeditation]; *People v. Bolin*, *supra*, 18 Cal.4th at p. 319 [photographs assisted jury in evaluating defendant's intent to kill]; *People v. Scheid*, *supra*, 16 Cal.4th at pp. 14-15 [photographs were relevant to the circumstances of the crime and to corroborate testimony].)

The photographs also were relevant to help Dr. Resk explain his testimony that the blunt force trauma to Pennington's skull was inflicted before the victim was shot. (*People v. Box* (2000) 23 Cal.4th 1153, 1199 [photographs were relevant to clarify coroner's

testimony]; *People v. Welch* (1999) 20 Cal.4th 701, 750-751 [photographs were relevant to assist the pathologist in illustrating the nature of the wounds and manner of killing]; *People v. Crittenden*, *supra*, 9 Cal.4th at pp. 132-133 [photographs were relevant to clarify medical examiner's testimony and establish manner of death].)

The fact that defendant cracked open Pennington's skull, and then shot him after he was incapacitated by the blows, tended to defeat defendant's claim of self-defense. (*People v. Pinholster* (1992) 1 Cal.4th 865, 966 [the right of self-defense is limited to the use of such force as is reasonable under the circumstances and does not extend beyond the time of real or apparent danger]; *People v. Lucas* (1958) 160 Cal.App.2d 305, 310 [measures of self-defense cannot continue after the assailant is disabled]; *People v. Keys* (1944) 62 Cal.App.2d 903, 916 [self-defense is no longer justified when the danger has passed and is no longer imminent]; *People v. McCurdy* (1934) 140 Cal.App. 499, 503 [defendant fired first shot in self-defense, but was not justified in continuing to fire after the assailant was disabled].)

Defendant argues the photographs were irrelevant because Dr. Resk described Pennington's injuries in detail, thus rendering the photographs cumulative to other evidence. However, contrary to defendant's implied assertion otherwise, "'"[t]he prosecution was not obliged to prove these details solely from the testimony of live witnesses, and the jury was entitled to see how the physical details of the . . . body supported the prosecution theory."'" (*People v. Jackson* (1996) 13 Cal.4th 1164, 1216, quoting *People v.*

Raley (1992) 2 Cal.4th 870, 897.) "Subject to the trial court's authority to exclude cumulative evidence under Evidence Code section 352 . . . it is immaterial for purposes of determining the relevance of evidence that other evidence may establish the same point." (*People v. Scheid, supra*, 16 Cal.4th at p. 16; see also *People v. Gurule* (2002) 28 Cal.4th 557, 625.)

B

Defendant contends the trial court abused its discretion under section 352 because, in his view, the photographs were too graphic and gruesome, and there was no need to admit all of them. We are not persuaded.

As we have noted, the three photographs assisted the jury in understanding Dr. Resk's testimony regarding the nature and timing of Pennington's injuries, evidence that was critical to assessing the conflicting theories of premeditated murder and self-defense. The photographs depict Pennington's head from different angles, with the scalp shaved and pulled back, exposing the bullet wound and blunt force injuries. They are unpleasant, but not unduly gory or excessively disturbing. None of them is "a revolting portraiture displaying horribly contorted facial expressions that conceivably could inflame a jury." (*People v. Scheid*, *supra*, 16 Cal.4th at p. 19.)

Having examined the photographs, we conclude that they are not unduly gruesome or inherently inflammatory, such that their probative value was outweighed by any prejudicial effect. (*People v. Medina* (1995) 11 Cal.4th 694, 754 [photo showing the top of the victim's head with most of the skin, skull, and brain removed,

and a wooden probe inserted through a hole in the head for purposes of demonstrating the trajectory of the bullet was not unduly inflammatory and prejudicial].) And we reject defendant's claim that he was prejudiced by the introduction of the "sheer number" of them. (See *People v. Lucas* (1995) 12 Cal.4th 415, 448-450 [21 photos of victims' bodies not an abuse of discretion under section 352].)

According to defendant, the introduction of the photographs "cannot be shown to be harmless" (caps. omitted) because the trial court's analysis under section 352 "fell short." However, it is defendant's analysis that falls short.

"[W]hen ruling on a section 352 motion, a trial court need not expressly weigh prejudice against probative value, or even expressly state it has done so. All that is required is that the record demonstrate the trial court understood and fulfilled its responsibilities under . . . section 352." (*People v. Williams* (1997) 16 Cal.4th 153, 213 [rejecting argument that trial court's comments were too short and conclusory to demonstrate the balancing required by section 352]; *People v. Lucas, supra,* 12 Cal.4th at pp. 448-449; *People v. Crittenden*, *supra*, 9 Cal.4th at p. 135.)

The record discloses that the trial court was well aware of its responsibilities under section 352. Both defense counsel and the prosecutor presented evidentiary arguments, and the prosecutor submitted written points and authorities on the subject. Then, the court carefully examined the four photographs that were proffered and excluded one of them because it was unduly inflammatory. This is sufficient to establish the court was aware of, and performed,

its duty to balance the probative value of each photograph against any prejudicial effect. (*People v. Box, supra*, 23 Cal.4th at p. 1200; *People v. Crittenden*, *supra*, 9 Cal.4th at p. 135.)

C

Defendant also contends that the admission of the autopsy photographs constituted federal constitutional error because the trial court's erroneous evidentiary ruling "is of such magnitude that the result is a denial of fundamental fairness." (*United States ex rel. Palmer v. DeRobertis* (7th Cir.) 738 F.2d 168, 170.)

Defendant forfeited this objection by not tendering it in the trial court. In any event, there is "no constitutional error, in view of our determination that the photographic evidence properly was admitted into evidence." (*People v. Hart* (1999) 20 Cal.4th 546, 617, fn. 19; see also *People v. Jackson, supra,* 13 Cal.4th at p. 1216 [defendant's constitutional claims failed because they were merely recharacterizations of his unsuccessful section 352 claim].)

II

Reiterating arguments that he made in a motion for new trial, defendant contends he received prejudicial ineffective assistance of counsel.

To succeed on such a claim, defendant must show that his trial attorney's action was, objectively considered, both deficient under prevailing professional norms and prejudicial. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 693-694 [80 L.Ed.2d 674, 693, 697].) In order to establish prejudice, he must show a reasonable probability that, but for his trial attorney's failings, the result

of the proceeding would have been more favorable to him. (*Id.* at p. 694 [80 L.Ed.2d at p. 698]; *People v. Seaton* (2001) 26 Cal.4th 598, 666.)

A

Defendant claims his trial counsel did not conduct an adequate investigation because he failed to locate defendant's clothing from the day of the shooting. In defendant's view, the clothes were crucial to his self-defense claim because they would have refuted the prosecution's argument that defendant destroyed them, which evidenced a consciousness of guilt.

At trial, one of the arresting officers testified he had searched the room that defendant shared with Stephanie Salisbury, but was unable to find the clothing that defendant wore on the day of the shooting. Defendant testified that he had left the clothing in the bathroom, and Salisbury testified that she had laundered the clothing and placed it in storage when she moved. Salisbury stated that she "had been asked several times by different people" about the clothing, but that "[n]obody seemed too interested" in waiting for her to find the clothes.

At the hearing on defendant's motion for new trial, trial counsel admitted that defendant told him the clothes had not been destroyed, and counsel noted that prior to trial, he had spoken with Salisbury on several occasions. Nevertheless, until Salisbury testified, counsel did not know the clothes allegedly were still available. He explained that, based on the police reports and on the standard procedure followed by a reasonable law enforcement officer conducting a search, he believed that the officers had

searched defendant's entire residence, not just the bedroom as the officer testified at trial, yet they did not locate the clothing.

Trial counsel is required to make a reasonable investigation. Reasonableness depends upon the totality of the circumstances, and great deference is given to counsel's judgment. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 691 [80 L.Ed.2d at p. 695]; *In re Cudjo* (1999) 20 Cal.4th 673, 692.) We cannot say that trial counsel acted unreasonably under the circumstances in relying on the results of the search performed by law enforcement officers.

In any event, the prosecutor had ample other evidence of defendant's consciousness of guilt, including that he cut his hair, disposed of the murder weapon, and altered his vehicle. Thus, spending time establishing that defendant had not destroyed his clothing would not have assisted the defense in any meaningful way. Consequently, trial counsel's omission did not prejudice defendant. The evidence against defendant was strong, and his self-defense claim was devoid of merit. Because he believed Pennington had stolen a welder, defendant led Pennington down a secluded road, blocked his car in a driveway, pointed a loaded gun at him, caused him to lie face down on the hood of a car, shot the gun twice in the air, and threatened him loudly. Assuming that Pennington reached for a knife at this point, as defendant alleged, defendant was not entitled to resort to self-defense. (*In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1 [self-defense not available to defendant who wrongfully creates circumstances under which an adversary's attack is legally justified]; *People v. Moore* (1954) 43 Cal.2d 517, 524 [self-defense is not available where

defendant seeks or induces a quarrel and does not abandon force before the victim retaliates]; *People v. Gleghorn* (1987) 193 Cal.App.3d 196, 201 ["if one makes a felonious assault upon another, or has created appearances justifying the other to launch a deadly counterattack in self-defense, the original assailant cannot slay his adversary in self-defense unless he has first, in good faith, declined further combat, and has fairly notified him that he has abandoned the affray"].)

Simply stated, there is no reasonable probability that, but for counsel's failure to locate the clothing, the jury would have returned a verdict more favorable to defendant. (*Strickland v. Washington, supra,* 466 U.S. at p. 694 [80 L.Ed.2d at p. 698]; *People v. Seaton, supra,* 26 Cal.4th at p. 666.)

B

Next, defendant contends his trial counsel's performance was deficient because he failed to call as a witness Pennington's former employer, who would have testified about being assaulted by Pennington. Defendant argues this testimony was crucial to his self-defense claim because it demonstrated Pennington's aggressive tendencies.

At the hearing on defendant's motion for new trial, counsel explained that he did not believe it was necessary to call the former employer as a witness because there was ample other evidence of Pennington's character, including that he was on parole, he had what appeared to be prison tattoos, and he had armed himself with a knife prior to the incident.

Whether to call certain witnesses is a matter of trial tactics unless that decision results from an unreasonable failure to investigate. (*People v. Jones* (2003) 29 Cal.4th 1229, 1251; see *People v. Bolin, supra,* 18 Cal.4th at p. 334.) An appellate court will reverse based on ineffective assistance of counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for the claimed incompetent act or omission. (*People v. Milner* (1988) 45 Cal.3d 227, 238; *People v. Adkins* (2002) 103 Cal.App.4th 942, 951.) We cannot say counsel's decision that Pennington's employer was not needed reflects an irrational tactical choice or incompetence.

Besides, it is not reasonably likely that the jury would have returned a verdict more favorable to defendant if Pennington's employer had testified. As we already have explained, defendant's self-defense claim was devoid of merit, regardless of Pennington's alleged violent character. Defendant shot him in the top of the head, while he was lying prone on the hood of the car. Thus, even assuming Pennington was in the process of trying to reach for a knife at the time of the shooting, this occurred after defendant had created a situation in which Pennington would be justified in defending himself. Defendant had physically threatened him, ordered his friend to leave the area, ordered Pennington to place himself in a vulnerable position draped over the hood of a car, and fired two shots from a gun. Having done so, defendant was not entitled to claim self-defense when Pennington tried to defend himself from what appeared to be an imminent danger of bodily harm. (*In re Christian S., supra,* 7 Cal.4th at p. 773, fn. 1; *People v.*

Moore, supra, 43 Cal.2d at p. 524; *People v. Gleghorn, supra,* 193 Cal.App.3d at p. 201.)

C

In another attack on trial counsel's performance, defendant complains that counsel (1) failed to object to the jury's release over the weekend prior to deliberating, and (2) failed to ask the court to admonish the jury to disregard a headline, published in the Chico *Enterprise-Record* that weekend, incorrectly stating: "Defendant Claims Shot to *Back* of Head was Self Defense." (Italics added.)

Defendant concedes that before releasing the jurors for the weekend, the judge directed them not to read any news articles or watch any television shows about the case. The jurors are presumed to have followed the judge's instructions, absent some evidence, such as juror affidavits, demonstrating that jurors read the inaccurate newspaper article and were influenced by it. (*People v. Terry* (1970) 2 Cal.3d 362, 397, disapproved on another point in *People v. Carpenter* (1997) 15 Cal.4th 312, 381-382.) Defendant points to no such evidence.

Even if a juror had read the article, it is unlikely that the juror would have been influenced by it. All the evidence showed that defendant shot Pennington in the *top* of the head, and the jury saw the autopsy photographs depicting the location of the gunshot wound. (*People v. Terry*, *supra*, 2 Cal.3d at p. 397 [media representation would not likely have influenced the jurors because they heard testimony on the subject and would have realized the inaccuracy in the media].)

Furthermore, given that defendant's self-defense claim entirely lacked merit, it is not reasonably probable that the verdict would have been different but for counsel's omission. (*Strickland v. Washington, supra,* 466 U.S. at p. 694 [80 L.Ed.2d at p. 698]; *People v. Seaton, supra,* 26 Cal.4th at p. 666.)

D

Lastly, defendant claims the judgment must be reversed because of the cumulative prejudicial effect of all of counsel's alleged errors. However, "no serious errors occurred that, whether viewed individually or in combination, could possibly have affected the jury's verdict." (*People v. Martinez* (2003) 31 Cal.4th 673, 704; *People v. Valdez* (2004) 32 Cal.4th 73, 128.)

DISPOSITION

The judgment is affirmed. The trial court is directed to amend the abstract of judgment to reflect the imposition of an enhancement under Penal Code section 12022.53, subdivision (d), and to forward a certified copy of the amended abstract to the Department of Corrections.

SCOTLAND, P.J.

We concur:

DAVIS, J.

NICHOLSON, J.